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Allen M. Linden

Osgoode Hall Law School of York University

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RESCUERS AND GOOD SAMARITANS*

ALLEN M. LINDEN*

In the past, tort law has displayed a reluctance to impose a duty to rescue or to compensate rescuers injured during a rescue attempt. Furthermore, tort liability has been imposed upon would-be rescuers whose incompetence has led to an abortive attempt. Professor Linden argues that this reluctance to promote rescue is out-dated in a modern society which espouses humanitarian ideals. The author examines Canadian and English jurisprudence to demonstrate the recent recognition of the need to encourage and compensate Good Samaritans. New tort duties to render aid, which have been fashioned by analogy to criminal legislation, are analysed as well as the rescuer's duty which arises once the rescue has been undertaken. Professor Linden also discusses the applicability of the principle of voluntary assumption of risk to a rescuer's claim for compensation for injuries sustained during the course of the rescue. The author concludes by suggesting that the concept of contributory negligence be used to dissuade rash rescue attempts in place of the current judicial practice of complete denial of compensation.

Everyone admires a rescuer and a Good Samaritan. The common law, however, in years gone by did not go out of its way to reward such conduct. A rescuer injured while attempting to save someone in peril used to be denied tort recovery. Someone who acted as a Good Samaritan might also be mulcted in damages if his effort was bungled. At the same time, no one was obligated to render assistance, even though he could do so without danger to himself. These principles could hardly have encouraged altruism. Happily, in the last few years tort law has begun to cast off these harsh ways. Rescuers now win reparation if they are hurt offering succour to someone negligently imperilled. The law has mollified its treatment of a deliverer whose effort to assist another in danger goes awry. In some situations, a duty to render aid is being established, where no such duty existed before. The purpose of this article is to look at some of the developments in this area of the law. The field is of special interest because the Canadian courts have made a significant contribution in recent years to the jurisprudence on the topic.

I. DUTY TO RESCUE

There is no general duty to assist anyone in peril. The law reports contain some sickening examples of callous refusal to help, followed by immunity from tort liability. For example, one need not lift a finger to rescue a drowning man,¹ nor issue a warning to someone who is walking into a dangerous situation.² A doctor is under no obligation to attend a sick patient.³ According to our law we can stand by and watch a man starve or bleed to death⁴ without incurring any legal

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* Professor of Law, Osgoode Hall Law School, York University.

¹ *Osterlind v. Hill* (1928) 263 Mass. 73, 160 N.E. 301; *Horsley v. MacLaren* [1970] 2 O.R. 487 at 499 (per Jessup J.A.).

² *Gautret v. Egerton* (1867) L.R. 2 C.P. 371; *Buch v. Amory Manufacturing Company* (1897) 69 N.H. 257, 44 Atl. 809.

³ *Hurley v. Edingfield* (1901) 156 Ind. 416, 59 N.E. 1058.

⁴ *Allen v. Hixson* (1900) 111 Ga. 460, 36 S.E. 810.

liability. This is not merely cruelty for its own sake. The early courts were hesitant to undertake the job of requiring people to help their neighbors for their hands were full enough trying to prevent them from attacking one another.⁵ The law tried to encourage and reflect a strong sense of independence and individualism. It was considered a virtue to mind one's own business and get along in the world without anybody else's help.⁶ Moreover, the judges were dubious about trying to enforce unselfishness because this was too much an infringement of personal freedom.⁷ Professor Ames has explained that underlying this was the idea that the proper role of the common law was to prevent people from harming one another, rather than to force them to confer benefits on one another.⁸ Another reason behind this nonfeasance principle was that it did not seem reasonable to force someone to throw himself in the way of an armed attacker of a complete stranger and risk injury or the loss of his life. The absence of any tort compensation for rescuers injured while assisting someone in danger underscored the wisdom of this view. There were also administrative reasons for refusing to force people to rescue others. For example, it is rather difficult to select which one of the many individuals on a crowded beach should bear the responsibility to the man who drowns in full view of them all. Moreover, there are difficulties in defining what degree of danger someone is supposed to risk in order to help someone else. Lastly, once somebody offers assistance, it is not easy to decide how long he must continue to look after the bleeding stranger.⁹

All these matters have been impediments to development, but, happily, our hearts have begun to conquer our brains and the law has started to move in the direction of encouraging rescue. If someone *negligently* creates a situation of peril, he is obligated to assist anyone injured as a result of his own conduct.¹⁰ Similarly, if one undertakes to help, he is said to have assumed a duty.¹¹ There are a group of special relations where one must act for the benefit of another, as in the case of carriers, innkeepers, bailees and perhaps shipmasters and storekeepers.¹² The courts have found it easier to impose this duty here because the person placed under the obligation normally derives some economic advantage from the relationship.¹³

The courts have also indicated a willingness to describe conduct as misfeasance rather than nonfeasance in certain specified instances. In other words, liability is being imposed for affirmative acts of negligence in creating a risk of danger rather than for mere failure to act.

In *Menow v. Honsberger and Jordan House Ltd.*,¹⁴ an intoxicated patron of a bar was turned out of the hotel, which was situated near

⁵ See Prosser, *Handbook of the Law of Torts* 334 (3d. ed. 1964) Fleming, *The Law of Torts* 145 (3d. ed. 1965). See generally Honore, *Law, Morals and Rescue*, in Ratcliffe, *The Good Samaritan and The Law* (1966).

⁶ See Harper & James, *The Law of Torts* 1046; (1956) Hale, *Prima Facie Torts, Combination and Nonfeasance*, (1946) 46 Colum. L. Rev. 198 at 213; McNiece and Thornton, *Affirmative Duties in Tort*, (1949) 58 Yale L.J. 1272 at 1288.

⁷ Minor, *Moral Obligation as a Basis of Liability*, (1923) 9 Va. L. Rev. 421 at 422.

⁸ Ames, *Law and Morals*, (1908) 22 Harv. L. Rev. 97.

⁹ See generally Linden, *Tort Liability for Criminal Nonfeasance*, (1966) 44 Can. Bar Rev. 25 at 30 et seq..

¹⁰ *Northern Central Ry Co. v. State* (1868) 29 Md. 420.

¹¹ See Prosser, *supra*, n. 5 at 336.

¹² *Id.* 334; Arturburn, *The Origin and First Test of Public Callings*, (1927) 75 U. Pa. L. Rev. 217.

¹³ Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, (1908) 56 U. Pa. L. Rev. 217.

¹⁴ [1970] 1 O.R. 54 (Ont. H.C.) affirmed [1971] 1 O.R. 129 (C.A.). See also *Hembler v. Todd* (1970) 14 D.L.R. (3d) 637.

a rather busy highway. As he walked along the road in his drunken state, the plaintiff was injured by an automobile which was negligently driven. The innkeeper was held partially at fault on the ground, *inter alia*, that his employees "owed the plaintiff a common law duty of care not to eject him if they knew or ought to have known that he would thereby be placed in a position of danger to his personal safety."¹⁵ In reaching this decision, Mr. Justice Haines relied on a series of cases in which common carriers were held liable for ejecting intoxicated passengers into situations of peril.¹⁶

There is another recent case in Manitoba, *Oke v. Weide Transport Ltd.*,¹⁷ where similar reasoning was invoked. The defendant without negligence collided with a metal traffic sign-post on the gravel strip dividing two lanes of a highway. He left it bent over and projecting at right angles, and did not report it to the authorities. The plaintiff motorist, illegally using the median strip to pass another vehicle, was fatally injured when he was impaled by this post. Although the majority of the Manitoba Court of Appeal dismissed the action on the ground of lack of foresight, Freedman J.A. argued that the defendant was not in the same position as any other motorist with regard to the dangerous sign-post. First, he had collided with the post, albeit without negligence. Second, he was stopped by the sign and had an opportunity to observe the hazard it created, while a passing motorist could do so only fleetingly. Thirdly, he "participated in the creation of the hazard," recognized his obligation to do something and even took some steps in that direction. The courts, therefore, are beginning to view conduct that could be considered mere nonfeasance as misfeasance or creation of risk.

Recently there has been an indication that the courts will rely upon criminal legislation, not only to crystallize the standard of care, but to fashion new tort duties to render aid. Most judges have done this by relying on an intention theory, although most authors have attacked them for it.¹⁸ One of the most celebrated instances of penal legislation being invoked to establish a new tort duty is the case of *Monk v. Warbey*.¹⁹ The defendant, Warbey, lent his vehicle to Knowles who in turn permitted a third person, May, to use it. Warbey, the owner, was himself insured against third party risks as required by a statute, but neither Knowles nor May were so insured. May negligently injured the plaintiff Monk, who sued Knowles, May and Warbey. Interlocutory judgments were obtained against Knowles and May, but these people were apparently penniless and the matter proceeded against Warbey on the theory that his violation of the compulsory insurance legislation gave the claimant a right to tort recovery. This view was adopted by the trial judge, who was affirmed in the Court of Appeal. Lord Justice Greer enunciated the principle as follows:²⁰

¹⁵ *Id.* at 62.

¹⁶ *Dunn v. Dominion Atlantic Ry Co.* (1920) 60 S.C.R. 312, (1920) 52 D.L.R. 149; *Howe v. Niagara, St. Catharines & Toronto Ry Co.* (1925) 56 O.L.R. 202, [1925] 2 D.L.R. 115.

¹⁷ (1964) 41 D.L.R. (2d) 53. *Cf. Millette v. Co.* [1971] 2 O.R. 155 (Ont. H.C.), failure to keep road free of ice and neglect by policeman to notify.

¹⁸ See Linden, *supra*, n. 9 at 35 *et seq.*

¹⁹ [1935] 1 K.B. 75.

²⁰ *Id.* at 81.

Prima facie a person who has been injured by the breach of statute has a right to recover damages from the person committing it, unless it can be established by considering the whole of the act that no such right was intended to be given. So far as that being shown in this case, the contrary is established.

Two of the judges relied on subsection 4 of the legislation, which permitted a money deposit instead of securing insurance, as evidence of a legislative intention to confer civil rights.

I suggest, however, that the real reason for this decision was not the interpretation exercise engaged in by the court. If Parliament had really intended this result it could have so specified in the statute, as it has done on occasion. Rather the court wished to advance the policy of the legislation by providing compensation to those injured in auto accidents. There is support for this view in the language of the judges. Lord Justice Greer felt that the criminal sanction was inadequate to assist someone injured by an uninsured driver if a civil remedy were not available. His Lordship stated that "To prosecute for a penalty is no sufficient protection and is poor consolation to the injured person, though it affords a reason why persons should not commit a breach of the statute."²¹ Lord Justice Maugham described the purpose of the statute as that of "giving a remedy to third persons who might suffer injury by the negligence of an impecunious driver of a car..."²² He stated further that car accidents and injuries to third persons were so common that "it was necessary in the public interest to provide machinery whereby those third persons might recover damages." This decision has been attacked by several learned authors. Glanville Williams described the decision as "an improper type of judicial invention."²³ Professor Fleming contended that it was "difficult to justify on any account," that it was a "most blatant arrogation of legislative authority" and that it was an example of judicial discretion being stretched "beyond... legitimate bounds."²⁴ And, yet, if the theory of legislative intention can be invoked to fix a standard of care for reasonable men to obey, it should, logically, be available to courts who wish to create a new tort duty to act. In both situations, the courts are being less than frank when they tell us that they have found a legislative intention, when, in fact, none has been expressed in the enactment. Despite these attacks, *Monk v. Warbey* is now well-established in the law and has even received the ratification of the House of Lords in *McLeod (Houston) v. Buchanan*,²⁵ where Lord Wright argued that "the provision is an important element in the policy of the legislature to secure the benefit of insurance for sufferers of road accidents."

Another area where tort responsibility by analogy to the criminal law has been recognized is hit-and-run accidents. Penal legislation everywhere orders those involved in an automobile accident to stop, give their name and address and render whatever assistance is required.²⁶ Many American courts have held violators of this type of legislation civilly liable where additional damages have resulted to

²¹ *Id.*

²² *Id.* at 86.

²³ *The Effect of Penal Legislation in The Law of Torts*, (1960) 23 Mod. L. Rev. 233.

²⁴ *Supra*, n. 5 at 130, and the 2nd ed. 1961 at 134.

²⁵ [1940] 2 All E.R. 179 at 186.

²⁶ *E.g.*, The Highway Traffic Act, R.S.O. 1960, c. 172, s. 143a.

those injured because of their refusal to offer succour. There is very little discussion in the cases about why the courts have done this. In some of the cases the language to this effect is merely *obiter dicta*. Nevertheless, it seems well-entrenched in the law. The leading case is probably *Brooks v. E. J. Willig Transport Company*,²⁷ where the Supreme Court of California upheld a statement in the charge to the jury to the effect that knowingly to refuse to stop after an accident was a breach of a civil duty which did not depend upon the negligence of the driver nor on the freedom from contributory negligence by the victim. The court stated the principle as follows:²⁸

One who negligently injures another and renders him helpless is bound to use reasonable care to prevent any further harm which the actor realizes or should realize threatens the injured person. This duty existed at common law, although the accident was caused in part by the negligence of the person who was injured The legislation requires . . . an automobile driver who injures another to stop and render aid. This duty is imposed upon the driver whether or not he is responsible for the accident, and a violation gives rise to civil liability if it is a proximate cause of further injury or death.

The court did not give us the policy reasons which motivated it to adopt this rule and did not even cite an earlier case to the same effect in the same state.²⁹ Nevertheless, this case has been followed in other states. While it does not appear to have been invoked yet in the Commonwealth, there is no reason to doubt that it would be if the opportunity presented itself.

Even though the courts have not stated why they have used hit-and-run statutes in this way, one might make some intelligent guesses about this. The civil courts are helping the legislatures to encourage Good Samaritanism on the highways where thousands are killed and injured each year. It may be that by imposing civil liability as well as penal sanctions the courts can further reduce the incidence of hit-and-run violations. The courts have not disguised the moral repugnance they feel toward those who hit and run; they have permitted evidence of a breach of a hit-and-run statute to be used as proof of negligence in the original accident and they have awarded punitive damages in some of these cases.³⁰ Since automobile insurance is prevalent in these cases, the courts are able to act as loss distributors as well as loss shifters. The absence of many of the administrative problems generally associated with these Good Samaritan cases has facilitated the development. The defendant has been singled out by becoming involved in an accident. There is seldom any danger to him in rendering assistance, because all he need do in most cases is telephone for an ambulance or help redirect traffic. There is every reason to believe that these cases will attract support in the years ahead and will form another large exception to the no liability for nonfeasance rule.

This theory of tort liability based upon violation of criminal statute has recently been given a lift by the Ontario Court of Appeal in the case of *Horsley v. MacLaren*.³¹ The defendant, MacLaren, owned a

²⁷ (1953) 40 Cal. (2d) 669, 255 P. (2d) 802.

²⁸ *Id.* at 808-809.

²⁹ *Summers v. Dominguez* (1938) 29 Cal. App. (2d) 308, 84 P. (2d) 237 (D.C.A.).

³⁰ See *Battle v. Kilcrease* (1936) 54 Ga. App. 808, 189 S.E. 573; *Hallman v. Cushman* (1941) 196 S.C. 402, 13 S.E. (2d) 498.

³¹ [1970] 2 O.R. 487 (C.A.); See Linden, *Comment* (1970) 48 Can. Bar Rev. 541.

cabin cruiser, upon which he took some friends for a cruise one cool, spring day. Brisk winds came up and made the Lake Ontario water choppy, driving most of the passengers below. Matthews remained on the deck, but he soon got up and proceeded toward the stern of the boat. For no apparent reason, he lost his footing and toppled over into the forty-four degree Fahrenheit water. A passenger shouted "Roly's overboard." MacLaren threw the boat into neutral and the passengers scrambled up to the deck. MacLaren then reversed the motors and backed up to where Matthews had been seen, forty to fifty feet astern. The engines were shut off and the boat drifted towards Matthews. A life ring and a life jacket were thrown into the water by a passenger, while another tried to hook Matthews with a pikepole. Matthews made no attempt to assist himself, but merely floated with outstretched arms, his eyes open and glassy, apparently unconscious. As the boat began to drift away, McLaren started the engines again and backed up the boat toward Matthews once more. After a few minutes had elapsed, Horsley, one of the passengers removed his clothing and dove into the icy water emerging about ten feet from Matthews. Mrs. Jones, another passenger, noticing Matthews' body fall forward into the water, also leaped in to help, but could not prevent Matthews' body from going under the starboard quarter of the boat. Mr. Jones, upon seeing his wife in the water, took over the controls of the boat and swung it around, approaching his wife "bow on" and pulled her aboard safely. MacLaren again resumed control of the boat and picked up Horsley, but he could not be resuscitated, having died from cardiac failure as a result of the sudden shock from being immersed in the cold water. The body of Matthews was never recovered and, therefore, the exact cause of death remained unknown, but it was believed that he also died of a heart attack.

At the trial, Matthews' family was denied recovery on the ground that there was no evidence of causal relation between his death and MacLaren's conduct. Horsley's family, however, was successful. On an appeal by the defendant, the Ontario Court of Appeal reversed the decision and dismissed Horsley's action as well.

Mr. Justice Lacourciere, at the trial,³² expanded the "quasi-contractual" duty of the carrier to his passenger so that it would apply to the master of a pleasure boat and his invited guest. His Lordship relied in part upon the Canada Shipping Act, which imposes a criminal fine upon a master of a vessel who fails to "render assistance to every person...who is found at sea and in danger of being lost..." His Lordship stated that:³³

Parliament reflecting the conscience of the community has seen fit to impose on the master a duty to render assistance to any stranger, including an enemy alien 'found at sea and in danger of being lost...'; the common law can be no less solicitous for the safety of an invited guest and must impose upon the master the duty to attempt a rescue, when this can be done without imperilling the safety of the vessel, her crew and passengers. The common law must keep pace with the demands and expectations of a civilized community, the sense of social obligation, and brand as tortious negligence the failure to help a man overboard in accordance with the universal custom of the sea.

³² [1969] 2 O.R. 137.

³³ *Id.* at 143.

The Court of Appeal, while reversing the decision of the trial judge, did not interfere with his reasoning on this point. Mr. Justice Jessup argued that the Canada Shipping Act covered not only strangers "found at sea" but also passengers. He declared that he was unable to "adopt...an interpretation which would ascribe to Parliament a solicitude for the lives of alien enemies at the same time denied by it to passengers and crews of Canadian ships."³⁴ He concluded by saying that the Canada Shipping Act "on one or the other of the legal theories by which the courts attach civil consequences to the breach of a penal provision in a statute will support a cause of action..." His Lordship also agreed with Mr. Justice Lacourciere's imposition of a duty of care upon a master of a ship to his passenger who falls overboard.³⁵

A passenger on a ship is in the position of total dependence on the master and I think that peculiar relationship must now be recognized as invoking a duty of the master, incident to the duty to use due care in the carriage by sea of a passenger, of aid against the perils of the sea. Falling overboard is such a peril, and in that situation I do not think that the common law can do otherwise than to adopt the statutory duty to render assistance.

Mr. Justice Schroeder (MacGillivray J.A. concurring), was slightly more cautious in articulating his reasons for decision. He denied that the breach of a statute could "create" a legal duty to rescue. Nevertheless, he asserted that:³⁶

...Parliament, in enacting this section, gave expression to humanitarian principles, which should guide the consciences of civilized men in their relations even to an enemy who was found in peril at sea, and this must have an important bearing on the question as to whether a moral or social duty...can be ripened into a legal duty not only to come to his passenger's aid, but also to exercise reasonable care in the rescue procedure.

Mr. Justice Schroeder's language indicates that he recognizes the need for tort law to follow the criminal law by creating new tort duties based on these penal statutes. This case is now under appeal to the Supreme Court of Canada and it is to be hoped that it will lend its support to this view.

There is every expectation that this theory will be favourably received by Mr. Justice Laskin, who has recently been appointed to the Supreme Court, because he has already expressed his support for it in *Colonial Coach Lines v. Bennet and C.P.R.*³⁷ In that case the plaintiff's bus was damaged when it collided with a cow that escaped from a farmer's land onto the highway through a defective fence along the railway's right of way. In holding the railway partially responsible to the plaintiff, Mr. Justice Laskin relied on two sections of the Railway Act of Canada. Section 277 created an obligation to erect fences "suitable to prevent cattle...from getting on the railway lands." Section 392 imposed a civil liability for failing to do so, if the loss occurred on "railway lands." Mr. Justice Laskin reasoned as follows:³⁸

³⁴ [1970] 2 O.R. 487 at 500.

³⁵ *Id.* at 501.

³⁶ *Id.* at 492.

³⁷ (1968) 66 D.L.R. (2d) 396 (Ont. C.A.).

³⁸ *Id.* at 403.

[Although] the railway's strict liability under section 392 extends generally to injury on the railway right of way arising from a failure to fence, it may incur liability beyond this scope for injury off the right of way which, by reason of what it knew or ought to have known, could reasonably be foreseen as likely to occur if it failed to keep in repair a fence known to it to be defective. This liability for negligence is not founded merely on breach of a statutory duty to fence, but proceeds on a footing of a state of facts comprehending maintenance of a fence to prevent the escape, from the adjoining land, of cattle which, if not contained, might stray on to a highway open from the right of way and expose oncoming traffic to the risk of injury. The triggering elements of liability are the railway's awareness of the defective condition of the fence and failure to take immediate measures to avert injury, which could be reasonably foreseen. Existence of a statutory obligation to fence and actual assumption thereof by the railway were simply factors in the raising of a duty of care to the plaintiff by the railway when it knew that the obligation had not been met.

Perhaps the farthest any court has gone on the basis of this theory was in *Menow v. Honsberger & Jordan House Ltd.*³⁹ In that case the hotel owner, *inter alia*, violated Ontario legislation which forbade the selling of liquor to intoxicated people. Mr. Justice Haines held that these provisions "were enacted not only to protect society generally, but also to provide some safeguard for persons who might become irresponsible and place themselves in a position of danger..." His Lordship then concluded that "by committing this unlawful act, the corporate defendant has not only committed an offence...but it has breached a common law duty to the plaintiff..." because "...it may be inferred that the legislators intended to provide for tort liability..." Penal legislation, therefore, is a factor that courts will consider in determining whether they will fashion a new tort duty. They are moving by analogy to penal legislation in the imposition of civil liability by creating novel civil duties of care that correspond to duties laid down in criminal legislation.

There are some cases, however, where the courts have refused to do so. The reason most commonly given in these situations is that the statute evinced no intention to create tort liability. It is suggested, however, that there is no more and no less legislative intention visible here than in the other cases. For example, in the *Commerford* case,⁴⁰ a municipal by-law required abutters to clean ice and snow from adjoining sidewalks. The defendant breached the statute and the plaintiff was injured when he slipped on the ice. The court decided that no civil liability was created by this violation of statute because there was no intention to this effect in the by-law. In support, the court pointed to other provisions that enacted civil liability for the breach of certain sections, it stated that no specific power had been given to the municipality to provide for tort liability and argued that the small penalty evinced a legislative benevolence toward homeowners. This decision is typical of many in the United States to the same effect.⁴¹ The real reason for this decision, however, is not intention. Rather, the courts distrust these inferior law-making bodies and are unwilling to advance their legislative policies. Moreover, the policy of these by-laws is a harsh one in that it transfers the burden of road care from the municipalities to neighbouring landowners. To saddle such landowners with a

³⁹ *Supra*, n. 14.

⁴⁰ [1950] 2 D.L.R. 207 (N.S.S.C.).

⁴¹ See e.g., *Willis v. Parker* (1919) 225 N.Y. 159, 121 N.E. 810.

civil obligation as well as the penal duty to tend the sidewalks is just going too far. The failure of the courts to hold liable a race-track owner for failing to provide space to a book-maker contrary to a statute can also be supported on the ground that the policy of the statute was not worthy of expansion, although the court stated that the penalties were "effective sanctions" and stood "in no need of aid from civil proceedings."⁴² Lord Simonds gave a clue to his thinking when he declared that "the statute was not the charter of the bookmakers."⁴³

II. DUTY OF THE RESCUER

Once someone undertakes a rescue, he not only risks injury to himself, but he may be responsible in tort to the person he tries to rescue, if the effort is bungled. Fortunately, there are not very many cases of actions against Good Samaritans, but there are a few that have been successful. For example, in *Zelenko v. Gimbel Bros.*,⁴⁴ the deceased was taken ill in the defendant's store. The defendant undertook to render medical aid and kept her in its infirmary without any medical care for six hours. The court felt that by segregating the plaintiff it was made impossible for another bystander to summon an ambulance. Mr. Justice Lauer of the Supreme Court of New York stated that "if a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task." This case has been relied on for the proposition that once one undertakes to assist someone in peril, he must exercise reasonable care and will be responsible for failing to do so. Such a rule would be rather hard on the well-meaning rescuer and might tend to discourage potential Good Samaritans. Often doctors give this rule as a reason for not stopping at the scene of an automobile accident.

This interpretation may be inaccurate, however, in the light of the case of *East Suffolk Rivers Catchment Board v. Kent*.⁴⁵ In that case, a public authority began to fix a damaged sea wall that had permitted the plaintiff's land to be flooded. It delayed in doing the work so that the defendant's land was submerged for a much longer period than it would have been had they done the work properly. The defendant agency, was, nevertheless, relieved of liability on the ground that it had exercised its discretion in an acceptable way. Despite the fact that the plaintiff was not well-served, his position was not worsened by their actions. The court was unwilling to place any stringent obligations upon the public authority for fear that it would avoid undertaking assistance altogether. Most of these cases involved public authorities and municipalities.⁴⁶ As a result, it was thought that this principle was limited to such bodies.⁴⁷

⁴² *Cutler v. Wandsworth Stadium* [1949] A.C. 398.

⁴³ *Id.* at 404.

⁴⁴ (1935) 287 N.Y.S. 134. See also *Barnett v. Chelsea and Kensington Hospital* [1968] 1 All E.R. 1068 (Q.B.D.) (dictum).

⁴⁵ [1941] A.C. 74.

⁴⁶ *Stevens-Willson v. Chatham* [1933] O.R. 305 affirmed [1934] S.C.R. 353; *Sheppard v. Glossop Corporation* [1921] 3 K.B. 132. See Friedmann, *Statutory Powers and Legal Duties of Local Authorities*, (1945) 8 Mod. L. Rev. 31.

⁴⁷ *Fleming, supra*, n. 5 at 148.

However, the case of *Horsley v. MacLaren*⁴⁸ has indicated that this doctrine may have a broader application. It will be recalled that, when the plaintiff, Matthews, fell overboard, the defendant undertook to rescue him by backing up towards him. The evidence was that this was the wrong procedure. Mr. Justice Lacourciere, at trial, exacted the usual standard of reasonable care from the rescuer. He asked "What would the reasonable boat operator do in the circumstances...?" Because the defendant used the "wrong procedure" in backing the boat up and because of his "excessive consumption of alcohol," he held that there was negligence.⁴⁹

The Court of Appeal, however, felt that there was only an error in judgment which did not amount to negligence. Mr. Justice Jessup relied upon the *East Suffolk Rivers Catchment Board v. Kent* case and adopted its test. He contended that:⁵⁰

...where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another, he incurs no liability unless what he does worsens the condition of that other.

Mr. Justice Jessup rejected the rationale used by the trial judge and argued:⁵¹

I think it is an unfortunate development in the law which leaves the Good Samaritan liable to be mulcted in damages, and apparently in the United States, it is one that has produced marked reluctance of doctors to aid victims.

Mr. Justice Schroeder echoed this view and argued that:⁵²

...if a person embarks upon a rescue, and does not carry it through, he is not under any liability to the person to whose aid he has come so long as discontinuance of his efforts did not leave the other in a worse condition than when he took charge.

Since MacLaren's rescue effort had not worsened Matthews' position, even though it may not have complied with the standard of "text-book perfection", he was relieved of responsibility.

The purpose of this rule is to encourage potential rescuers by reducing the risk of liability to them if their effort is unsuccessful. This is a wise policy so long as it does not foster careless rescue operations. It is possible to mismanage a rescue attempt horribly and yet not worsen the position of the already doomed man. The law must fashion a rule that does not inhibit would-be rescuers and yet does not invite well-meaning bunglers to interfere. A preferable approach might be the one pioneered in the United States. Over thirty American jurisdictions have enacted legislation relieving doctors and nurses and, on some occasions, ordinary citizens from tort liability for their conduct at the scene of an accident, except if they are guilty of gross negligence.⁵³ The Province of Alberta has also enacted such a statute. The Emergency Medical Aid Act states:⁵⁴

3. Where, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,

⁴⁸ [1970] 2 O.R. 487 (C.A.), reversing [1969] 2 O.R. 137.

⁴⁹ [1969] 2 O.R. 137 at 145-146.

⁵⁰ [1970] 2 O.R. 487 at 500.

⁵¹ *Id.* at 502.

⁵² *Id.* at 495.

⁵³ Louisell & Williams, *The Trial of Medical Malpractice Cases* s.594.2 (1960).

⁵⁴ S.A. 1969, c.28, s.3.

- (a) a physician or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or
 - (b) a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency,
- the physician, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his part.

Such an approach retains some control over the conduct of rescuers while at the same time it does not frighten them away. Although one might quarrel with some of the conditions in the statute such as the necessity to rescue "without expectation of compensation," its general thrust is welcome. It is hard to tell whether it will really increase the frequency of rescue efforts, but at least the excuse of fear of liability will be unavailable to Bad Samaritans in the future.

III. DUTY TO THE RESCUER

Many years ago rescuers were denied tort recovery on the ground that they had voluntarily assumed the risk of injury or on the ground that the defendant was not the cause of their loss. Such a case was that of *Anderson v. Northern Railway of Canada*⁵⁵ where the plaintiff leaped in front of a train to try to save a woman and was killed. The case was dismissed on a split decision in the Court of Appeal because the cause of the injury to the deceased was his own conduct. In the intermediate Court of Appeal, admiration was expressed for the defendant's "gallant self-sacrifice", but the court held that the injury was "self-sought" and "self-caused".⁵⁶ Another example of such a case was *Kimball v. Butler Bros.*⁵⁷ where the volunteer theory was invoked to deny compensation to the family of the deceased who had suffocated during a rescue attempt when a fire broke out in the Detroit tunnel as it was being built. Because the rescuer was acting "solely as a volunteer" and with a "full comprehension of danger", the court refused to impose liability.⁵⁸

Perhaps the earliest case that granted any tort compensation to a rescuer was a 1910 Manitoba decision, *Seymour v. Winnipeg Electric Railway*.⁵⁹ On a demurrer it was held, contrary to the *Anderson* case, that a rescuer could recover from a negligent wrongdoer. Mr. Justice Richards, after recognizing that "the promptings of humanity towards the saving of life are amongst the noblest instincts of mankind,"⁶⁰ concluded that:⁶¹

...the trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence of third persons are entitled to claim such compensation from such third persons for injuries they may receive in such attempts.

⁵⁵ (1876) 25 U.C.C.P. 301.

⁵⁶ *Id.* at 307.

⁵⁷ (1910) 15 O.W.R. 221 (C.A.).

⁵⁸ *Id.* at 222.

⁵⁹ (1910) 13 W.L.R. 566 (Man. C.A.).

⁶⁰ *Id.* at 568.

⁶¹ *Id.*

It is strange that twenty-three years after this case was decided the English courts were still struggling with the concepts of causation and *volenti* in dealing with the problem of rescue. For example, in *Cutler v. United Dairies*⁶² the plaintiff was injured while holding the head of a runaway horse in response to the driver's call for help. Although the jury found for the plaintiff, the action was dismissed on appeal. The court reasoned that "the damage must be on his own head" and also that "a new cause has intervened."⁶³ Mr. Justice Slesser argued that in some cases where somebody dashes out to save someone in danger recovery might be available because there is no *novus actus interveniens*. His Lordship continued, however, by concluding that although the act was "heroic and laudable" it cannot be said that it was "not in the legal sense the cause of the accident."⁶⁴ In another English case, *Brandon v. Osborne Garrett and Co.*,⁶⁵ the problem was avoided when Mr. Justice Swift described as "instinctive" the rescue act of a wife who tried to pull her husband away from glass falling from a skylight. These little distinctions about causation and about whether the rescue was instinctive or deliberate did not add very much to our understanding of the law nor did they assist in the solution of these cases.

It took the great American judge, Mr. Justice Cardozo, to finally set this matter to rest. In one of the most beautifully written passages in any tort case, Mr Justice Cardozo stated the principle in *Wagner v. International Railway Company*⁶⁶ as follows:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

In 1938 the English courts finally succumbed to the Canadian and American lead and granted recovery to the rescuer. In *Haynes v. Harwood*⁶⁷ a police constable tried to push a woman out of the way of a runaway horse and was injured in the attempt. The court distinguished *Cutler* on the ground that "nobody was in any danger" there and that a policeman was "expected" to help those in danger. The decision for the plaintiff was affirmed by the Court of Appeal and Lord Justice Greer justified the decision as follows: "It would be a little surprising if a rational system of law...denied any remedy to a brave man."⁶⁸ Lord Justice Maugham indicated that the problem was not as simple as it might first appear. It is necessary to balance the interests which are sought to be protected and the other interests involved. In other words, one must take into account the degree of danger and the probable response of the rescuer.

⁶² [1933] 2 K.B. 297 (C.A.). See Goodhart, *Rescue and Voluntary Assumption of Risk*, (1934) 5 Camb. L. J. 192.

⁶³ *Cutler v. United Dairies*, *supra*, n. 62 at 303.

⁶⁴ *Id.* at 306.

⁶⁵ [1924] 1 K.B. 548.

⁶⁶ (1921) 232 N.Y. 176, 133 N.E. 437.

⁶⁷ [1934] 2 K.B. 240, *affirmed* [1935] 1 K.B. 146.

⁶⁸ *Id.* at 152.

Since the breakthrough of *Haynes v. Harwood* the courts of the Commonwealth have showered much attention upon the rescuer. In *Videan v. British Transport Commission*,⁶⁹ for example, the duty to the rescuer was extended to cover a rescuer of an "unforseeable" trespasser. A child trespassed on a railway and an employee of the railway rushed to save him from being run over by a train and was injured in the attempt. The court denied the child compensation on the ground that he was a trespasser, whereas it granted recompense to the rescuer. Although two of the judges did so on the ground that the rescuer, as an employee of the railway, was owed a special duty of care, Lord Justice Denning based his decision on the ground that the rescuer was foreseeable while the trespasser was not! Lord Denning alluded to the desire of the common law to encourage rescue in these words: "Whoever comes to the rescue, the law should see that he does not suffer for it."⁷⁰ The protection of the rescuer has been extended a long way. Similarly, someone who suffered anxiety neurosis after he helped in a rescue operation after a train wreck was permitted to recover tort damages in circumstances where they probably would have been denied to an ordinary by-stander.⁷¹

A person is not only liable to those injured while rescuing *third persons* that he places in danger, but, if he gets *himself* into trouble, he owes a duty to someone who comes to his aid. Although there was some early authority to the contrary,⁷² a plea to extend the "humanitarian doctrine of rescue", by the late Dean Cecil A. Wright⁷³ was heeded because "as between a careless man and the heroic rescuer the policy of the law favours shifting the loss from the latter to the former." Although fault to the third person is the usual situation, Dean Wright urged that "fault with respect to oneself should also suffice." In *Baker v. Hopkins*,⁷⁴ this theory was adopted by Mr. Justice Barry at trial who disapproved of the *Dupuis* case and stated that, although no one has a duty to preserve his own safety, "if by his own carelessness a man puts himself into a position of peril, of a kind that invites rescue, he would in the law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid."⁷⁵ This case was upheld on appeal, but the court did not refer specifically to this point. The Australian courts in *Chapman v. Hearse*⁷⁶ have also accepted this principle. In that case, Dr. Chapman was killed when a negligent motorist collided with him while he was helping someone on the highway who was injured because of his own negligence. Dr. Chapman's family brought action against the motorist, who added the careless person being helped, as a third party. The court, without mentioning either the *Dupuis* case or the *Baker* case, held the person being rescued by Dr. Chapman twenty-five per cent responsible and stated that if support was necessary, "ample can be found in the analogous rescue cases."

⁶⁹ [1963] 2 All E.R. 860 (C.A.). For a discussion of this case see Tiley, *The Rescue Principle*, (1967) 30 Mod. L. Rev. 25.

⁷⁰ *Id.* at 868.

⁷¹ *Chadwick v. British Transport Commission* [1967] 2 All E.R. 445 (K.B.D.).

⁷² *Dupuis v. New Regina Trading Co. Ltd.* [1943] 4 D.L.R. 275.

⁷³ (1943) 21 Can. Bar Rev. 758 at 763, 764, and 765.

⁷⁴ [1958] 3 All E.R. 147 (Q.B.D.), *affirmed* [1959] 1 W.L.R. 966.

⁷⁵ *Id.* at 153.

⁷⁶ [1961] S.A.S.R. 51, *affirmed* (1961) 106 C.L.R. 112.

It should be noted here that the person being rescued was held responsible in part for the act of someone who *negligently* injured the rescuer as he was participating in the act of rescue.

Although the courts were slow in doing so, they have awarded tort damages for personal injuries even to rescuers of property. The Supreme Court of Canada, for example, in *Connel v. Prescott*⁷⁷ recognized that someone hurt attempting to protect endangered horses could recover from the person who negligently put the horses in peril. Similarly, in *Hutterly v. Imperial Oil*,⁷⁸ the plaintiff attempted to drive his car out of a burning garage and was injured in the attempt. Liability was imposed upon the defendant, both for the damage to the car and for the personal injury to the plaintiff, despite the fact that he could easily have escaped himself without being injured, on the ground that his attempt to save his property was not unreasonable. People who are burned while helping to put out fires are also awarded tort compensation.⁷⁹ In addition to losses for personal injuries suffered during attempts to save property, the courts will compensate for loss to property incurred during such an attempt. In the case of *Thorn v. James*,⁸⁰ a servant tried to prevent one of his employer's machines being destroyed in a fire by hooking some horses to it and pulling it free. He failed in his attempt and the horses were burned. The original negligent defendant was made responsible to pay for the horses because the rescue effort was said to have been reasonable in the circumstances.

IV. THE CONTRIBUTORILY NEGLIGENT RESCUER

The common law does not protect every single rescuer no matter how foolish his attempt may be; there must be some reasonably perceived danger to a person or goods and the conduct of the rescuer must be reasonable in the circumstances. This does not mean, of course, that a claimant Good Samaritan must establish that there was *actual* danger. Nor does it mean that the rescuer must act in a perfect way.

There were some early authorities that seemed to demand proof of actual danger before a rescuer could be entitled to recover,⁸¹ but they were too harsh and served to impede rather than to reward rescue attempts. This is no longer the case. All that is required now is a reasonable belief that somebody is in peril. For example, a claimant may recover damages even if the person being "rescued" is already dead, but this is not known.⁸² In *Ould v. Buttler's Wharf*⁸³ a rescuer wrongly believed that a fellow workman was in danger of being hit by the hook of a crane. He tried to push him out of the way, but, as he did so, the imperilled man dropped the case of rubber that he was carrying onto the rescuer's foot. Mr. Justice Gorman held for the rescuer even though he was wrong in his assessment of the danger, because he felt that there was an "imminent serious accident." A futile rescue attempt may, consequently, be compensated

⁷⁷ (1892) 2 O.A.R. 49, *affirmed* 22 S.C.R. 147.

⁷⁸ [1956] 3 D.L.R. (2d) 719.

⁷⁹ *Russel v. McCabe* [1962] N.Z.L.R. 392; *Hyett v. G.W. Ry.* [1948] 1 K.B. 345 (C.A.).

⁸⁰ (1903) 14 Man. R. 373.

⁸¹ *McDonald v. Burr* [1919] 3 W.W.R. 825 (Sask. C.A.); *Brine v. Dubbin* [1933] 2 W.W.R. 25 (Alta. S.C.).

⁸² *Wagner v. International Railway* (1921) 232 N.Y. 176, 133 N.E. 437.

⁸³ [1953] 2 Lloyd's Rep. 44.

with tort damages if it is a reasonable one. This is understandable because it is often difficult to know in advance if a rescue effort will yield positive results as where children are lost in the woods or where miners are buried in a mine. If there is a reasonable chance of saving life or avoiding injury, the common law cannot deny recovery to those hurt during these attempts for fear that they may be discouraged from their heroic acts.

In addition to the need for a reasonable perception of danger, the response of the rescuer must be a reasonable one. For example, if somebody jumps off the Peace Tower to rescue a little child on the road and is killed in the process, he ought not to be compensated. The courts have justified this conclusion by holding that the rescuer was either "foolhardy",⁸⁴ "rash",⁸⁵ or "needlessly reckless"⁸⁶ and, therefore, the rescue attempt was not foreseeable and no duty was owed. This approach is in my view unsatisfactory because it limits the right to recover more than is necessary to achieve the purpose of dissuading foolish rescue attempts. Tort law seeks to encourage men to help one another but not to do so foolishly. The courts are, therefore, correct in refusing to make the original wrongdoer pay for the losses of the stupid rescuer. By denying him compensation, it seeks to diminish the frequency of unwise rescue efforts. But the test of foolhardiness is inadequate because it is too blunt an instrument. A more delicate tool would be preferable. Comparative negligence is a more flexible device, but there is little evidence of it being used to date. In fact, there is authority to the effect that contributorily negligent rescuers cannot recover at all. For example, in the *Brandon* case,⁸⁷ the court indicated that if a rescuer "did something a reasonable person ought not to have done," he will be denied recovery. Now, this may have been acceptable, prior to the legislation that permits us to split responsibility, because both foolhardy rescue attempts and negligent ones would yield precisely the same result. Today, however, there are several different results that might be achieved if comparative negligence were used. For example, an utterly hopeless and ridiculous rescue effort can still be held to be outside the duty of care of the original defendant because it is unforeseeable. Some rescue attempts, however, may not be intelligently executed and yet may not be utterly devoid of some merit. There is no reason why a reduced award cannot be granted to the rescuer which would give him something for his heroism without ignoring the fact that he was less than careful.

The ordinary tort principles should obtain here and in the case of *Sayers v. Harlow Urban District Council*⁸⁸ there is some support for this view. A lady was trapped in a public lavatory through the negligence of the defendant and was injured while trying to climb out of it. In order to avoid coming to the conclusion that there was no duty owed the plaintiff, who was a kind of "self-rescuer", the court found that she was not guilty of conduct that was "unwise or imprudent

⁸⁴ *Supra*, n. 74 at 153 (Q.B.D.).

⁸⁵ *Haigh v. Grand Trunk* (1914) 7 W.W.R. 806 (Alta. S.C.).

⁸⁶ *Supra*, n. 59 at 571.

⁸⁷ [1924] 1 K.B. 548 at 552.

⁸⁸ [1958] 2 All E.R. 342 (C.A.).

or rash or stupid." And, yet, the court went on to hold that the plaintiff "cannot entirely be absolved from some measure of fault," and deprived her of one quarter of her damages. This conclusion makes sense and there is reason to believe that the same result could be achieved with the ordinary rescuer as well as with the person who is saving himself. In *Baker v. Hopkins*⁸⁹ the court permitted the doctor rescuer to recover in full as he was held not to be "foolhardy" and yet it might have been wiser to reduce his recovery in the circumstances. *Horsley v. MacLaren*⁹⁰ dealt with these problems as well. The trial judge, Mr. Justice Lacourciere, clearly expressed the rules for the protection of rescuers. He felt that the conduct of Horsley, who leaped in to help the person who had originally fallen in, was not "futile, reckless, rash, wanton or foolhardy," nor was he guilty of contributory negligence. His Lordship did not think it mattered that the person being rescued could not have been helped. *Volenti* was rejected because it was not pleaded and because there was no free and voluntary assumption of the risk. Mr. Justice Lacourciere concluded that the rescuer was "within the risk created by the defendant's negligent conduct."

The Court of Appeal reversed, withholding compensation to Horsley. Mr. Justice Jessup did agree that a rescue attempt by a passenger is generally foreseeable in a situation of a mishandled rescue attempt. Nevertheless, he held that this particular rescuer could not reasonably have been anticipated because he had been warned to remain in the cabin because of his inexperience with boating. "By that command . . .", said Mr. Justice Jessup, "MacLaren insulated Horsley from such perils of the voyage as were eventually encountered . . ."⁹¹

Mr. Justice Schroeder circumscribed even further the protection afforded to rescuers by listing the factual circumstances which made the rescue attempt unforeseeable: the temperature of the water, the continuing efforts of the other people at rescue, the inability of Horsley to judge whether what was being done was reasonable, the order of MacLaren to Horsley to keep himself in the cabin, Horsley's failure to tell the skipper that he was going to dive into the water, the lack of precautions Horsley took in not donning a life jacket or attaching a rope to himself, particularly in circumstances where he saw the effect of the cold water upon Matthews.⁹² In other words, according to Mr. Justice Schroeder, the need for Horsley's rescue attempt was doubtful and his conduct of it was substandard. The trouble is that the Court of Appeal, therefore, went on to deny compensation altogether on the basis of lack of foresight and absence of duty.

This is unfortunate and wrong. The court should have held that such a rescue attempt was foreseeable, even in these bizarre circumstances, since it is not necessary to foresee the details of the way in which a rescue will be tried.⁹³ It should have held that the acts

⁸⁹ *Supra*, n. 74.

⁹⁰ *Supra*, n. 50.

⁹¹ *Id.* at 502.

⁹² *Id.* at 496.

⁹³ *Hughes v. Lord Advocate* [1963] A.C. 837. See Linden, *Down With Foreseeability! Of Thin Skulls and Rescuers* (1969) 47 Can. Bar Rev. 545.

of this particular plaintiff amounted to contributory negligence, so that instead of being denied compensation altogether his award should have been reduced by twenty-five or fifty percent. If this technique had been utilized, the court might have been able not only to reward the rescuer, but also to penalize him by cutting his award. Of course, it is always open to the court to hold that a rescue operation is so absolutely stupid that the claimant should be denied recovery altogether, as would have been the case if the plaintiff could not swim or if it was obvious to everybody that the person in the water was already dead. In my view it is unwise to say that the mere flouting of an order to stay below is so unforeseeable as to preclude the rescuer from recovery, especially in the light of authority to the effect that foreseeable consequences include intervening negligence,⁹⁴ a violation of transit company rules,⁹⁵ theft of an article,⁹⁶ and even suicide.⁹⁷ The onus of showing that the rescuer was foolhardy rests upon the defendant⁹⁸ which is quite consistent with the ordinary principles of contributory negligence. Moreover, this question is a jury question and not one for the court.⁹⁹ As might be expected, the courts have not been too harsh in their evaluation of the conduct of the rescuer, which is as it should be in all emergency cases.¹⁰⁰

In conclusion, the courts are beginning to use tort law to encourage rescuers and Good Samaritans. New duties to act are being created. The standard of care demanded of rescuers is being diminished. Injured rescuers are being compensated, even where they are partially to blame for their loss. Enterprises are, therefore, being forewarned that not only do they have to pay for damages caused to individuals endangered, but also to rescuers who come to their aid. Perhaps greater care will be fostered by this rule. The loss distribution goals of tort law are being served and costs are being spread to those engaged in activities, or those who benefit from them rather than being borne by the victims. In any event, there are fewer rescue situations to-day where the law is out of step with current notions of morality, which is something to be welcomed.

⁹⁴ *Supra*, n. 76.

⁹⁵ *Harris v. T.T.C.* [1967] S.C.R. 460.

⁹⁶ *Stansbie v. Troman* [1948] 2 K.B. 48; *Patten v. Silberschein* [1936] 3 W.W.R. 169; *Cf. Duce v. Rourke* (1951) 1 W.W.R. 305 (Alta.).

⁹⁷ *Pigney v. Pointers Transport Services Ltd.* [1957] 1 W.W.R. 1121; *Stadel v. Albertson* [1954] 2 D.L.R. 328 (Sask.).

⁹⁸ *Supra*, n. 74 at 244 (per Willmer L.J.).

⁹⁹ *Supra*, n. 55 at 323 (per Strong J.); *supra*, n. 59.

¹⁰⁰ *Morgan v. Aylen* [1942] 1 All E.R. 469.